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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL; et al.,
Appellants,
—v.—
ROTARY CLUB OF DUARTE; et al.,
Appellees.

ON APPEAL FROM THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

**BRIEF OF THE KIWANIS CLUB OF RIDGEWOOD,
INC. AND JULIE FLETCHER AS AMICI CURIAE
IN SUPPORT OF APPELLEES, ROTARY
CLUB OF DUARTE, et al.**

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INTEREST OF THE AMICI CURIAE

The Kiwanis Club of Ridgewood, Inc., and Julie Fletcher, as Amici Curiae, support affirmance of the judgment of the Court of Appeal of the State of California, Second Appellate District 178 Cal. App. 3d 1035 (1986). The Kiwanis Club of Ridgewood, Inc. and Julie Fletcher are parties to an action presently pending in the United States Court of Appeals for the Third Circuit involving the admission of an otherwise qualified woman to a traditionally all-male service club (Kiwanis International v. Ridgewood Kiwanis Club and Julie Fletcher, Docket Nos. 86-5199 and 86-5278, reversing 627 F.Supp. 1381). Kiwanis International has already filed an Amicus Brief in support of the

jurisdictional statement of Rotary International in this case.

The Kiwanis Club of Ridgewood, Inc. (hereinafter "Ridgewood") is a chartered member of Kiwanis International (hereinafter "International"). International is the parent organization of approximately 8,200 local Kiwanis Clubs with membership of about 330,000 throughout the world.

Membership in Kiwanis Clubs is limited to men pursuant to the Kiwanis Constitution and By-laws which the local clubs agree to adopt when accepting their charters.

On August 8, 1984, Julie Fletcher (hereinafter "Fletcher"), a female business and residential art consultant, was invited to become a member of Ridgewood. Fletcher met all of the

criteria of membership with the exception of her sex.

Thereafter, International advised Ridgewood that unless Fletcher's membership was terminated, Ridgewood's "license" to use the Kiwanis service marks would summarily be revoked.

On September 6, 1985, Ridgewood and Fletcher filed suit in the Superior Court of New Jersey, Chancery Division, Bergen County, against International alleging violation by International of the New Jersey Law against Discrimination N.J.S.A. 10:5-1, et seq. and Article I, Section I of the New Jersey Constitution, and seeking an injunction against the revocation of Ridgewood's license to use the Kiwanis service marks.

International filed suit in the United States District Court for the District of New Jersey alleging that Ridgewood, by admitting a woman member in violation of Kiwanis membership policy, had forfeited the right to use the Kiwanis service marks and was, by continuing to use them, infringing on International's marks under the Lanham Act, 15 U.S.C., Section 1051, et seq.

On September 12, 1985, International filed a Petition for removal of the state court action to the federal district court, based on diversity, where it was consolidated with International's original Complaint.

Ridgewood filed an Answer and Counterclaim seeking affirmative relief pursuant to 42 U.S.C., Section

1983, the U.S. Constitution, the New Jersey Law against Discrimination, N.J.S.A. 10:5-1 et seq., the New Jersey Constitution and the common law.

On November 18 and 19, 1985, the matter was tried before the Honorable H. Lee Sarokin held.

On March 4, 1986, the District Court entered a Final Judgment enjoining International from enforcing its sexually discriminatory membership policies in its licensing agreement with Ridgewood.

International filed Notices of Appeal from both the Final Judgment and subsequent Order awarding counsel fees to Ridgewood.

Thereafter, on December 3, 1986, the Third Circuit Court of Appeals

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reversed the decision of Judge Sarokin. Although Judge Sarokin reached both the Constitutional and statutory issues, the Third Circuit did not reach the Constitutional issues but based its decision solely on a construction of the New Jersey Law against Discrimination, holding that Ridgewood was not a "public accommodation" under the statute.

On December 17, 1986 Ridgewood and Fletcher filed a Petition For a Rehearing and Rehearing on Banc. The State of New Jersey, Division on Civil Rights, the entity charged by the New Jersey Law against Discrimination with the responsibility to interpret and enforce the New Jersey Law against Discrimination, filed an Amicus Curiae Brief in Support of Ridgewood

and Fletcher's Petition for Rehearing, asserting that the Court erred in its construction of New Jersey law. The Petition for Rehearing is currently pending.

Should the Third Circuit Court of Appeals decide to review its decision, and should it adopt the position of Ridgewood, Fletcher and the State of New Jersey, Division on Civil Rights, that the Kiwanis Club is a public accommodation under the New Jersey Law Against Discrimination, the Third Circuit would then be forced to reach the Constitutional issues of freedom of intimate and expressive association which were addressed by Judge Sarokin and briefed by the parties on the appeal. Ridgewood and Fletcher, therefore, are vitally interested in

the outcome of the within case as it may have a direct bearing on the ultimate decision in their case.

ARGUMENT

- I. A LARGE SERVICE CLUB SUCH AS ROTARY OR KIWANIS IS NOT ENTITLED TO EXCLUDE OTHERWISE QUALIFIED WOMEN BASED UPON AN ASSERTED RIGHT TO FREEDOM OF INTIMATE ASSOCIATION.
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In its opinion in Roberts v. United States Jaycees 82 L. Ed. 2d 462 (1984), 468 U.S. 609, 104 S. Ct. 3244 (1984), this Court reviewed at length and in detail the case law developing the right to freedom of intimate association. This Court stated Id. at 82 L. Ed. 2d 472, that the types of personal affiliations deserving of Constitutional protections are those that attend the creation and sustenance of a family - marriage eq. Zablocki v. Redhail 434 U.S. 374, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978); childbirth, eq. Carey v. Population

Services, Int'l 431 U.S. 678, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977); the raising and education of children, eq. Smith v. Organization of Foster Families 431 U.S. 816, 53 L. Ed. 2d 14, 97 S. Ct. 2094 (1977); and cohabitation with one's relatives, eq. Moore v. City of East Cleveland 431 U.S. 494, 52 L. Ed. 2d 531, 97 S. Ct. 2932 (1977).

The Court in Roberts continued, "family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one's life." (emphasis added) Id. at 472. Beyond this, the Court sought to

determine whether other associations, less personal than those enumerated above, might yet be close enough to be deserving of First Amendment protection.

The Court in Roberts analyzed the United States Jaycees practices and procedures to determine whether or not this was a truly 'intimate association'. In its analysis, the Court looked to such factors as size, purpose, policies, selectivity, and congeniality and found the Jaycees not entitled to protection.

The local chapters, said this Court, are ". . . large and basically unselective . . . apart from age and sex, neither the national organization nor the local chapters employs any criteria for judging applicants for

membership In fact, a local officer testified that he could recall no instance in which an applicant had been denied membership on any basis other than age or sex Furthermore, despite their inability to vote, hold office or receive certain awards, women affiliated with Jaycees attend various meetings, participate in selected projects, and engage in many of the organization's social functions Indeed, numerous non-members of both genders regularly participate in a substantial portion of activities . . . including many of the organization's various community programs, award ceremonies and recruitment meetings." Id. at 473 to 474.

In the case at hand, the California Court of Appeal similarly found that membership in Rotary was "far from continuous, personal and social." The California Court of Appeal pointed out that the local Rotary Clubs are formed only upon the approval of the International organization and that all members must abide by the rules set forth by International in its Consitution and By-Laws, or risk revocation of its charter. The California Court also found that the local clubs performed community services which took place in "public view". The local clubs also had high turnover rates. Rotary Club of Duarte v. Board of Directors, 224 Cal. Rptr. 213, 227 (Cal. App. 2 Dist. 1986). The California Court held that

while Rotary membership was somewhat selective, "the immense size of International and the number of Rotarians throughout the world is hardly indicative of an intimate relationship." Id. at 230. This is a crucial point and one made by Judge Sarokin as well in his decision in the Kiwanis case - it is the size of International which must be given prime consideration, not the size of a particular local club. In the within case, as well as the Kiwanis case, the local club invited the woman member(s) to join and it was the International - a group, in the case of Rotary, with nearly a million members, which interfered with the local's choice to associate with women on an equal basis.

In this regard, Judge Sarokin stated,

"throughout the hearing in this matter, Kiwanis [International] continually adverted to facts which suggested that its membership is highly selective and that members participate in the organization's activities for reasons of camaraderie A consideration of all the relevant aspects of the Kiwanis organization, however, shifts the balance in quite the opposite direction. As noted above, the organization in its entirety has 8,200 locals and a world wide membership of 313,000, and Kiwanis Clubs in North America experience a 75% attrition rate in the first year for new members. When viewed in such broad range, these characteristics fit ill with the concept of intimacy that the Court clearly intended to emphasize in Roberts. Furthermore, testimony established repeatedly that the primary function of Kiwanis is not to promote camaraderie among its members, but rather to perform charitable service to the community. While creating a sense of camaraderie is certainly a secondary goal of Kiwanis, and while that goal is as laudable and significant in that organization as is it in any communal effort that individuals chose to undertake, it is not the sine qua non of Kiwanis' existence. In any event, the ex-president of the Ridgewood Club testified that neither the comradeship of that club's members nor the clubs

overall charitable goals would be adversely affected in any way by the admission of women. This testimony was reinforced by evidence which established that the formal objectives of Kiwanis are in no way sex-specific, and that in clubs throughout the country women are often present at meetings and participate closely with the male members in the organization's charitable activities. Indeed, the only activities from which women are apparently excluded are office-holding and participation in Kiwanis Clubs primary decision-making processes. In light of all these factors, the Court must conclude that Kiwanis lacks the distinctive indicia of intimate association that might afford Constitutional protection to its members' decision to exclude women." 627 F. Supp. 1381 (D.N.J. 1986)

It is clear, that except for certain differences in the written procedures for the selection of members (it would appear, on paper, that the admission procedures of Rotary and Kiwanis are more highly selective than those of the Jaycees, however, in practice, it does not appear that people are turned down for

membership on any basis other than sex) the fact is that Rotary, Jaycees and Kiwanis do not represent the types of associations traditionally afforded Constitutional protections - small groups having not only a community of thoughts, experiences and beliefs, but also involving the distinctly personal aspects of their members' lives. While there may be groups whose right to intimate association should be afforded the First Amendment protection, an enormous, diverse service club such as Rotary is not such a group. 1/

1/ In Roberts v. United States Jaycees, supra at 479, this Court referred to a statement in the Minnesota Supreme Court's Decision in the same case, United States Jaycees v. McClure, 305 N.W. 2d 764, 771 (1981), that Kiwanis is a private organization as contrasted with the

Jaycees. A closer look at the Minnesota Supreme Court's decision and the lower federal court decisions reflects that Kiwanis was not clearly distinguished from the Jaycees by the Minnesota Supreme Court.

The Minnesota Supreme Court at 771 stated simply, "we, therefore reject the national organization's suggestion that it be viewed analogously to private organization such as the Kiwanis International Organization." No further explanation is given. Clearly, it was the National Jaycees, not the Minnesota Supreme Court, which suggested that Kiwanis was more "private" than the Jaycees.

The Minnesota Supreme Court Decision was followed by the Decision of the United States District Court in United States Jaycees v. McClure, 534 F. Supp. 766 (1982). With regard to Kiwanis that Court stated, "there is insufficient evidence in the record pertaining to the activities of these groups to allow any determination whether the statute would apply to them. . . ." Id. at 773.

A year later, the Eighth Circuit Court of Appeals reversed the District Court in United States Jaycees v. McClure 709 F.2d 1560 (1983). With reference to Kiwanis, the Court of Appeals harked back to the Minnesota Supreme Court Decision and said: "the opinion does not say what it is about the Kiwanis that makes it 'private'. . . . The record is hardly full as to the Kiwanis Club and its activities, but the information it does contain

seems rather to emphasize the similarities between the Kiwanis and the Jaycees then the difference. The Kiwanis Club has about 300,000 members nationwide, and about 7,750 local chapters, 1 Gale, Encyclopedia of Private Associations, supra, at 783 (16th Ed. 1981). It has as broad a range of activities as the Jaycees and competes for 'the same class of members,' except that the Kiwanis has no upper age limit."

The Court then quotes the Kiwanis membership requirements and states: "at the oral argument the State suggested that membership in the Kiwanis Club is less broadly available than membership in the Jaycees. The language quoted from the By-Laws of the Kiwanis Club fails to demonstrate this to our satisfaction."

The Court of Appeals comments regarding Kiwanis could as easily be applied to Rotary. It is clear that this Court's reference to Kiwanis in Roberts v. United States Jaycees, supra, was simply meant to illustrate the point that there might certainly be groups that were indeed so private that they would not be reached by the Minnesota statute, but that the Jaycees was not such a group.

**II. LARGE SERVICE CLUBS' RIGHTS TO
FREEDOM OF EXPRESSIVE ASSOCIATION
ARE NOT IMPERMISSIBLY AFFECTED BY
THE APPLICATION OF STATUTES
FURTHERING STATES' COMPELLING
INTEREST IN ERADICATING SEX
DISCRIMINATION.**

Once the issue of intimate association has been resolved with the finding that the Rotary Club is not that type of association invoking the Constitutional protections accorded marriage, childbirth and a similar associations, the Court must then determine whether or not Rotary members' right to expressive association has been infringed, and if so, whether such infringement is to an impermissible extent, by the Unruh Act (West's Ann Cal. Civ. Code Section 51) prohibiting discrimination on the

basis of sex by all "business establishments."

The freedom of expressive association is the freedom of each individual to engage in group effort, free from untoward interference by the State, to pursue various political, social, economic, educational, religious and cultural ends. Roberts v. United States Jaycees *supra* at 474.

The purposes and goals of Rotary do not include promulgation of the concept that women are somehow inferior or inadequate or unable to participate in making decisions. Service clubs are not like the Ku Klux Klan, which excludes Jews and Blacks because their purpose is to destroy them. Nor has it been shown that women's views of community service

differ from those of men such that the goals and activities of the service clubs would be affected. In fact, the Kiwanis women's auxiliary, the Kiwaniannes, is directly involved in Kiwanis service activities and fundraising projects. Women are also permitted to participate in Rotary functions.

Even if the association's members' rights were infringed, the infringement is necessary to advance the State's compelling interest in eradicating sex discrimination.

This Court, in Roberts v. United States Jaycees Id. at 474 to 475 stated,

"by requiring the Jaycees to admit woman as full voting members, the Minnesota Act works an infringement . . . there can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the

group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together . . . the right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling State interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedom.... We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."

This Court further found that the Jaycees failed to demonstrate that the Minnesota Act "imposed any serious burdens on male members' freedom of expressive association." Id. at 477.

Judge Sarokin came to the same conclusion in Kiwanis International v. Ridgewood Kiwanis Club and Julie Fletcher supra, finding that the testimony had repeatedly established

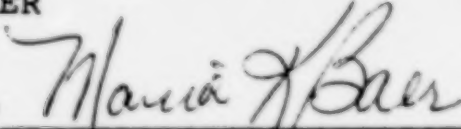
that women's full participation in Kiwanis Clubs would do little to inhibit male members freedom to express themselves as they currently do, since women are already permitted to participate in almost all of the activities in which such expression may occur. The California Court of Appeal was in accord as regards Rotary, essentially finding that Rotary members freedom of expressive association was entitled to no greater protection than that of the Jaycees. Rotary Club of Duarte v. Board of Directors supra at 231.

CONCLUSION

The Kiwanis Club of Ridgewood, Inc., and Julie Fletcher, respectfully urge this Court to affirm the Decision of the California Second District Court of Appeals in the within case, by finding that Rotary's First Amendment rights to freedom of association have not been impermissibly infringed upon by the California statute.

Respectfully submitted,

HIRSCH, NEWMAN, SIMPSON &
BAER

By 

Marcia Kuttner Baer

Dated: January 26, 1987